The Crime Victim at Trial

CHAPTER
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In this chapter. . .

Much of this chapter discusses rules of criminal procedure and evidence that allow victims and others to testify regarding the offense and its effects. In addition, the chapter discusses provisions of the Crime Victim's Rights Act ("CVRA") that deal with the crime victim at trial. The chapter includes discussion of the following topics:

- when a victim may be sequestered;
- when a motion for expedited trial may be granted on behalf of a victim;
- the rules governing the competency of witnesses;

- special protections that allow a child or developmentally disabled witness to testify at trial;
- when a pro-se defendant may be prevented from cross-examining a victim-witness;
- the "rape-shield statute";
- the admissibility of expert testimony on the effects of battering and sexual assault on adults and children;
- exceptions to the "hearsay rule" that allow a victim's out-of-court statements to be admitted at trial;
- the use of sign language and foreign language interpreters; and
- the effect of spectator buttons indicating support for the victim on the defendant's right to a fair trial.

8.1 The Victim's Constitutional Right to Attend Trial and Other Proceedings

The right of crime victims to attend criminal trials, juvenile adjudications, and other proceedings in Michigan is preserved by Const 1963, art 1, § 24. That provision states in relevant part:

> "(1) Crime victims, as defined by law, shall have the following rights, as provided by law:
>
> . . . .
>
> The right to attend trial and all other court proceedings the accused has the right to attend."

This constitutional provision allows a crime victim to attend any hearing that the accused has the right to attend. "A defendant has a right to be present during the voir dire, selection of and subsequent challenges to the jury, presentation of evidence, summation of counsel, instructions to the jury, rendition of the verdict, imposition of sentence, and any other stage of trial where the defendant's substantial rights might be adversely affected." *People v Mallory,* 421 Mich 229, 247 (1984). See also MCL 768.3; MSA 28.1026 (a person accused of a felony must be present during trial, but a person accused of a misdemeanor may request leave of court to appear through an attorney). Motions, conferences, and discussions of law, even during trial, do not involve substantial rights vital to defendant's participation in his or her own defense, and the defendant's presence is not required where defense counsel is present and participating, and where no evidence is being received nor substantial questions considered. However, a defendant is entitled to be present at pretrial evidentiary hearings on admissibility of evidence. *People v Thomas,* 46 Mich App 312, 320 (1973).

8.2 Sequestration and the Right to Attend Trial

In cases under the felony and misdemeanor articles of the CVRA, crime victims have the right to attend trial but may be sequestered until they first testify. The relevant provisions of the CVRA, MCL 780.761; MSA 28.1287(761), and MCL 780.821; MSA 28.1287(821), state:

> "The victim has the right to be present throughout the entire trial of the defendant, unless the victim is going to be called as a witness. If the victim is going to be called as a witness, the court may, for good cause shown, order the victim to be sequestered until the victim first testifies. The victim shall not be sequestered after he or she first testifies."

Similarly, in cases under the juvenile article of the CVRA, the victim has the right to be present throughout the entire contested adjudication or "traditional" waiver hearing, but the victim may be sequestered only until he or she first testifies. MCL 780.789; MSA 28.1287(789).

However, a statute and rule of evidence give the court authority to sequester a victim *after* he or she first testifies. A provision of the Revised Judicature Act, MCL 600.1420; MSA 27A.1420, gives the court authority to sequester witnesses to discourage collusion among them.* This statute allows the court, for good cause shown, to exclude witnesses from the courtroom *when they are not testifying.* Moreover, MRE 615 allows the court to exclude nonparty witnesses from the courtroom at the request of a party or on its own motion. The trial court has discretion to order the sequestration of a witness, and sequestration requests are ordinarily granted. *People v Cutler,* 73 Mich App 313, 315 (1977), and *People v Hill,* 88 Mich App 50, 65 (1979). Thus, under these rules, the court retains discretion to sequester a victim after he or she first testifies if the victim will be recalled as a rebuttal witness by either party.

*MCL 766.10; MSA 28.928, gives courts similar authority to sequester witnesses during preliminary examinations.

Under MRE 615, the court must not exclude "a person whose presence is shown by a party to be essential to the presentation of the party's cause." This exception normally applies in criminal cases to law enforcement personnel assisting the prosecuting attorney with the presentation of evidence, and it may apply to victim "support persons." See *People v Jehnsen,* 183 Mich App 305, 308 (1990).* See also *Walker v State,* 208 SE 2d 350 (Ga App, 1974) (absent a showing that it is necessary for an orderly presentation of a homicide case, allowing the deceased victim's parent to sit at the prosecutor's table during trial denied the defendant's right to a fair trial).

*See Section 8.6(C)(2), below, for further discussion of the *Jehnsen* case.

8.3 Motions for Expedited Trial on Behalf of the Victim

The felony and juvenile articles of the CVRA contain substantially similar provisions allowing for an expedited trial in some cases. MCL 780.759(1)(a)–(d); MSA 28.1287(759)(1)(a)–(d), and MCL 780.786a(1)(a)–(d); MSA

28.1287(786a)(1)(a)–(d), state that a "speedy trial" may be scheduled if the prosecuting attorney declares the victim to be one of the following:

> "(a) A victim of child abuse, including sexual abuse or any other assaultive crime.
>
> "(b) A victim of criminal sexual conduct in the first, second, or third degree or of an assault with intent to commit criminal sexual conduct involving penetration or to commit criminal sexual conduct in the second degree.
>
> "(c) Sixty-five years of age or older.
>
> "(d) An individual with a disability that inhibits the individual's ability to attend court or participate in the proceedings."

Upon motion of the prosecuting attorney for a "speedy trial" in a delinquency case involving any of the victims described above, the court must set a hearing date on the motion within 14 days after it is filed. In cases under the felony article of the CVRA, the chief judge of the circuit court must set the hearing date within 14 days after the motion is filed. MCL 780.759(2); MSA 28.1287 (759)(2). If the motion is granted, the trial shall not be scheduled earlier than 21 days from the date of the hearing. MCL 780.759(2); MSA 28.1287(759)(2), and MCL 780.786a(2); MSA 28.1287(786a)(2).

In cases under the misdemeanor article of the CVRA, "[a]n expedited trial may be scheduled for any case in which the victim is averred by the prosecuting attorney to be a child." MCL 780.819; MSA 28.1287(819).

8.4 Adjournments or Continuances

Delay in resolving a criminal or juvenile delinquency case is a primary source of frustration for crime victims. Continuances "prolong and intensify the victimization experience" and may be used "as a defense tactic to discourage victims from participating in the system." *New Directions from the Field: Victims' Rights and Services for the 21st Century* (Washington, DC: United States Department of Justice, 1998), p 89.

Motions for adjournment, continuance, or delay must be based on good cause shown. MCL 768.2; MSA 28.1025 (criminal cases), and MCR 5.942(A) (juvenile delinquency trials must be held within 6 months after the petition is filed unless adjourned for good cause). MCL 768.2; MSA 28.1025, states the following regarding stipulations for adjournments, continuances, or delays:

> "[N]o court shall adjourn, continue or delay the trial of any criminal cause by the consent of the prosecution and accused unless in his [or her] discretion it shall clearly

> appear by a sufficient showing to said court to be entered upon the record, that the reasons for such consent are founded upon strict necessity and that the trial of said cause cannot be then had without a manifest injustice being done." *Id.*

The following considerations should guide the trial court's discretion in granting or refusing a request for an adjournment or continuance:

- the defendant is asserting a constitutional right;
- the defendant has a legitimate reason for asserting the right;
- the defendant is guilty of negligence; and
- the defendant has caused prior adjournments or continuances.

People v Williams, 386 Mich 565, 578 (1972), and *People v Wilson,* 397 Mich 76, 81 (1976).

If an adjournment or continuance is granted, the prosecuting attorney should notify the victim as soon as possible to avoid causing the victim additional inconvenience and costs. *New Directions from the Field: Victims' Rights and Services for the 21st Century* (Washington, DC: United States Department of Justice, 1998), p 89.

8.5 Competency of the Victim as a Witness

Every person is presumed to be competent to be a witness. Michigan Rule of Evidence 601 states:

> "Unless the court finds after questioning a person that the person does not have sufficient physical or mental capacity or sense of obligation to testify truthfully and understandably, every person is competent to be a witness except as otherwise provided in [the Michigan Rules of Evidence]."

Whether a witness is competent to testify is within the court's discretion. In determining whether the witness will be able to testify understandably and truthfully, the court should evaluate the witness's basic ability to observe, remember, and recount what has been observed and remembered. The court should also evaluate the witness's understanding of the duty to tell the truth. *United States v Benn,* 155 US App DC 180, 183; 476 F2d 1127, 1130 (1972). If these abilities exist on a level that allows the witness to participate meaningfully in the proceedings, the degree of the witness's abilities must be left for the trier of fact to determine. See *People v Jehnsen,* 183 Mich App 305, 307 (1990) (four-year-old victim competent to testify), *People v Norfleet,* 142 Mich App 745, 749 (1985) (seven-year-old witness competent

to testify), and *People v Breck,* 230 Mich App 450, 457 (1998) (developmentally disabled rape complainant competent to testify).

Prior to 1999, MCL 600.2163; MSA 27A.2163, required the court to determine the competency of witnesses under 10 years of age. Because MCL 600.2163; MSA 27A.2163, was repealed by 1998 PA 323, a court is no longer required in all cases to determine whether a child under the age of 10 is competent to testify.

It is within the trial court's discretion to conduct an examination to determine a witness's competency. *People v Bedford,* 78 Mich App 696, 705 (1978). If an examination of a proposed witness is to be conducted, the court may conduct the examination or allow counsel to question the proposed witness. *People v Larry,* 162 Mich App 142, 153 (1987), and *People v Garland,* 152 Mich App 301, 309 (1986). The court's examination of the witness may be (but is not required to be) conducted out of the jury's presence. *People v Washington,* 130 Mich App 579, 581–82 (1983), and *People v Wright,* 149 Mich App 73, 74 (1986). A defendant's federal constitutional right to confront witnesses is not necessarily violated by the defendant's exclusion from a competency hearing. *Kentucky v Stincer,* 482 US 730, 739; 107 S Ct 2658; 96 L Ed 2d 631 (1987).

8.6 Special Protections for Child or Developmentally Disabled Victim-Witnesses

In juvenile delinquency and criminal cases, the Juvenile Code and the Revised Judicature Act respectively provide protections for child or developmentally disabled victims to allow them to testify during trial without further harm. This section contains a discussion of those provisions.

MCL 712A.17b(14); MSA 27.3178(598.17b)(14), of the Juvenile Code, and MCL 600.2163a(15); MSA 27A.2163(1)(15), of the Revised Judicature Act, provide that the procedures in those statutes are in addition to other protections or procedures afforded to a witness by law or court rule. Michigan Rule of Evidence 611(a) allows the court to "exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." See *In re Hensley,* 220 Mich App 331, 333–34 (1996), where the Court of Appeals held that the statutory provisions supplement rather than limit a trial court's authority to protect specified child and developmentally disabled witnesses. In juvenile delinquency proceedings, the court may appoint an impartial psychologist or psychiatrist to ask questions of a child witness at any hearing. MCR 5.923(F).

A. Offenses Covered by the Statutes

Pursuant to MCL 712A.17b(2)(a); MSA 27.3178(598.17b)(2)(a), and MCL 600.2163a(2); MSA 27A.2163(1)(2), the alternative procedures explained in Section 8.6(C) may only be used when one of the following offenses is alleged:

- child abuse, MCL 750.136b; MSA 28.331(2);
- sexually abusive commercial activity involving children, MCL 750.145c; MSA 28.342a;
- first-degree criminal sexual conduct, MCL 750.520b; MSA 28.788(2);
- second-degree criminal sexual conduct, MCL 750.520c; MSA 28.788(3);
- third-degree criminal sexual conduct, MCL 750.520d; MSA 28.788(4);
- fourth-degree criminal sexual conduct, MCL 750.520e; MSA 28.788(5); and
- assault with intent to commit criminal sexual conduct, MCL 750.520g; MSA 28.788(7).

B. Witnesses Covered by the Statutes

In cases involving the foregoing offenses, special statutory protections apply to victim-witnesses who are either:

- under 16 years of age, or
- 16 years of age or older and developmentally disabled.

MCL 712A.17b(1)(b); MSA 27.3178(598.17b)(1)(b), and MCL 600.2163a(1)(b); MSA 27A.2163(1)(1)(b).

MCL 712A.17b(1)(a); MSA 27.3178(598.17b)(1)(a), and MCL 600.2163a(1)(a); MSA 27A.2163(1)(1)(a), provide that "developmental disability" is defined in MCL 330.1100a(20)(a)–(b); MSA 14.800(100a)(20)(a)–(b). If applied to a minor from birth to age five, "developmental disability" means a substantial developmental delay or a specific congenital or acquired condition with a high probability of resulting in a developmental disability as defined below if services are not provided. MCL 330.1100a(20)(b); MSA 14.800(100a)(20).

If applied to an individual older than five years of age, "developmental disability" means a severe, chronic condition that meets all of the following additional conditions:

- is manifested before the individual is 22 years old;
- is likely to continue indefinitely;
- results in substantial functional limitations in three or more of the following areas of major life activity:
  - self-care;
  - receptive and expressive language;
  - learning;
  - mobility;
  - self-direction;
  - capacity for independent living;
  - economic self-sufficiency; and
- reflects the individual's need for a combination and sequence of special, interdisciplinary, or generic care, treatment, or other services that are of lifelong or extended duration and are individually planned and coordinated.

MCL 330.1100a(20)(a)(ii)–(v); MSA 14.800(100a)(20)(a)(ii)–(v).

A "developmental disability" includes only a condition that is attributable to a mental impairment or to a combination of mental and physical impairments, but does not include a condition attributable to a physical impairment unaccompanied by a mental impairment. MCL 712A.17b(1)(a); MSA 27.3178(598.17b)(1)(a), and MCL 600.2163a(1)(a); MSA 27A.2163(1)(1)(a).

The Court of Appeals has stated in dicta that disabilities caused by the charged offense do not qualify as disabilities under MCL 600.2163a; MSA 27A.2163(1). *People v Burton,* 219 Mich App 278, 286 (1996).*

*See Section 8.6(C)(4), below, for further discussion of the *Burton* case.

C. Protective Measures for Child or Developmentally Disabled Victim-Witnesses

If the requirements set forth in Sections 8.6(A) and (B), above, are met, a party or the court may move to allow one or more of the following measures to protect a witness. MCL 712A.17b; MSA 27.3178(598.17b), contained in the Juvenile Code, applies to juvenile delinquency cases, and MCL 600.2163a; MSA 27A.2163(1), applies to criminal cases. Although these provisions are

substantially similar, differences between them are noted in the succeeding discussion.

1. Dolls or Mannequins

The witness must be permitted to use dolls or mannequins, including, but not limited to, anatomically correct dolls or mannequins, to assist the witness in testifying on direct and cross-examination. MCL 712A.17b(3); MSA 27.3178(598.17b)(3), and MCL 600.2163a(3); MSA 27A.2163(1)(3).

2. Support Person

MCL 712A.17b(4); MSA 27.3178(598.17b)(4), and MCL 600.2163a(4); MSA 27A.2163(1)(4), provide that a child or developmentally disabled witness who is called upon to testify must be permitted to have a support person sit with, accompany, or be in close proximity to the witness during his or her testimony. A notice of intent to use a support person must name the support person, identify the relationship the support person has with the witness, and give notice to all parties to the proceeding that the witness may request that the named support person sit with the witness when the witness is called upon to testify during any stage of the proceeding. The notice of intent to use a named support person must be filed with the court and served upon all parties to the proceeding. The court shall rule on any motion objecting to the use of a named support person prior to the date on which the witness desires to use the support person.

In *People v Jehnsen,* 183 Mich App 305, 308–11 (1990), the Court of Appeals held that the trial court did not abuse its discretion by allowing the four-year-old victim's mother to remain in the courtroom following the mother's testimony. The victim's mother acted as a support person under MCL 600.2163a(4); MSA 27A.2163(1)(4), for the victim. Although the victim's mother engaged "in nonverbal behavior which could have communicated the mother's judgment of the appropriate answers to questions on cross-examination," the trial court found no correlation between the mother's conduct and the victim's answers. *Jehnsen, supra,* at 310. See also *People v Rockey,* 237 Mich App 74, 78 (1999) (where there was no evidence of nonverbal communication between the victim and her father, the trial court did not err in allowing the seven-year-old sexual assault victim to sit on her father's lap while testifying).

> **Note:** The Advisory Committee for this manual recommends that the judge meet with the proposed support person before trial to caution him or her not to react verbally or non-verbally to questions asked of the child witness. The proposed support person should also be cautioned not to make gestures toward the child witness during trial.

*See Section 8.2, above, for a discussion of sequestering witnesses.

> In addition, a "victim-witness assistant" may be used as a support person. This avoids conflicts with the rules governing sequestration of witnesses,* thereby assuring that the support person is available throughout the trial.

In *State v Suka,* 777 P2d 240, 241 (Hawai'i, 1989), the Supreme Court of Hawai'i held that the defendant's right to a fair and impartial trial was violated where a "victim-witness assistant" sat next to the rape complainant and stood behind her with her hands on her shoulders during the complainant's testimony. Because the complainant was 15 years old at trial, a statute allowing a support person, including a "victim/witness counselor," to sit beside a complainant did not apply. *Id.* at 243. The Court concluded that there was no showing that the complainant could not testify without the "victim-witness assistant's" presence, and that the procedures used bolstered the complainant's credibility. *Id.* at 242. The Court noted, however, that the prejudicial effect would be lessened where the support person was a family member and the witness was a child. *Id.* at 242, n 1. See also *State v Rulona,* 785 P2d 615, 617 (Hawai'i, 1990) (where there was no showing of "compelling necessity" for the eight-year-old sexual assault complainant to testify while sitting on a sexual assault counselor's lap, the trial court abused its discretion in allowing the procedure).

Decisions from other jurisdictions support the conclusion that it is not inherently prejudicial for "a parent, relative, friend, guardian ad litem, school employee, clergyman, prosecutor, or unspecified support person" to accompany a child victim-witness while testifying. See *State v Rowray,* 860 P2d 40, 44 (Kan App, 1993) and cases cited therein.

3. Rearranging the Courtroom

In **juvenile delinquency adjudications,** either party may make a motion to rearrange the courtroom to protect a child or developmentally disabled victim-witness. If the court determines on the record that it is necessary to protect the welfare of the witness, the court shall order one or both of the following:

> "(a) In order to protect the witness from directly viewing the respondent, the courtroom shall be arranged so that the respondent is seated as far from the witness stand as is reasonable and not directly in front of the witness stand. The respondent's position shall be located so as to allow the respondent to hear and see all witnesses and be able to communicate with his or her attorney.
>
> "(b) A questioner's stand or podium shall be used for all questioning of all witnesses by all parties, and shall be located in front of the witness stand." MCL 712A.17b(11)(a)–(b); MSA 27.3178(598.17b)(11)(a)–(b).

In determining whether it is necessary to rearrange the courtroom to protect the witness, the court shall consider the following:

> "(a) The age of the witness.
>
> "(b) The nature of the offense or offenses." MCL 712A.17b(10)(a)–(b); MSA 27.3178(598.17b)(10)(a)–(b).

Similarly, **in criminal trials,*** either party may make a motion to rearrange the courtroom to protect a child or developmentally disabled victim-witness. In addition to the arrangements available in delinquency trials, the court may exclude from the courtroom "[a]ll persons not necessary to the proceeding." MCL 600.2163a(12)(a); MSA 27A.2163(1)(12)(a). In this event, the witness's testimony must be broadcast by closed circuit television to the public in another location out of the sight of the witness. *Id.*

*In criminal cases, the court may also order these special arrangements at a preliminary examination. MCL 600.2163a(9); MSA 27A.2163a(9).

In criminal trials, when considering whether to rearrange the courtroom to protect the victim-witness, the court must consider the following factors:

> "(a) The age of the witness.
>
> "(b) The nature of the offense or offenses.
>
> "(c) The desire of the witness or the witness's family or guardian to have the testimony taken in a room closed to the public." MCL 600.2163a(11)(a)–(c); MSA 27A.2163(1)(11)(a)–(c).

Note: The Advisory Committee for this manual suggests bringing a child witness to the courtroom before trial to familiarize him or her with the courtroom and witness stand.

4. Using Videotape Depositions or Closed-Circuit Television When Other Protections Are Inadequate

In juvenile delinquency and criminal proceedings,* the court may order a videotape deposition of a child or developmentally disabled victim-witness on motion of a party or in the court's discretion. MCL 712A.17b(12); MSA 27.3178(598.17b)(12), and MCL 600.2163a(13); MSA 27A.2163(1)(13), provide that if the court finds on the record that the witness is or will be psychologically or emotionally unable to testify at a court proceeding even with the benefit of the protections set forth above, the court must order that a videotape deposition of a witness be taken to be admitted at a court proceeding instead of the live testimony of the witness.* The court must find that the witness would be unable to testify truthfully and understandably in the defendant's or juvenile's presence, not that the witness would "stand mute" when questioned. *People v Pesquera,* 244 Mich App 305, 311 (2001).

*The provisions discussed in this section apply to all court proceedings in delinquency and criminal cases, not just trials.

If the court grants the party's motion to use a videotape deposition, the deposition must comply with the requirements of MCL 712A.17b(13); MSA

27.3178(598.17b)(13), and MCL 600.2163a(14); MSA 27A.2163(1)(14). These provisions require that:

- the examination and cross-examination of the witness must proceed in the same manner as if the witness testified at trial; and
- the court must order that the witness, during his or her testimony, not be confronted by the respondent or defendant, but the respondent or defendant must be permitted to hear the testimony of the witness and to consult with his or her attorney.

In order to preserve a criminal defendant's Sixth Amendment right to confront witnesses against him or her face-to-face, the court must hear evidence and make particularized, case-specific findings that the procedure is necessary to protect the welfare of a child witness who seeks to testify. *People v Pesquera,* 244 Mich App 305, 309–10 (2001). In *Maryland v Craig,* 497 US 836, 855–56; 110 S Ct 3157; 111 L Ed 2d 666 (1990), the United States Supreme Court described the necessary findings:

> "The requisite finding of necessity must of course be a case-specific one: the trial court must hear evidence and determine whether use of the one-way closed circuit television procedure is necessary to protect the welfare of the particular child witness who seeks to testify. . . . The trial court must also find that the child witness would be traumatized, not by the courtroom generally, but by the presence of the defendant. . . . Denial of face-to-face confrontation is not needed to further the state interest in protecting the child witness from trauma unless it is the presence of the defendant that causes the trauma. In other words, if the state interest were merely the interest in protecting child witnesses from courtroom trauma generally, denial of face-to-face confrontation would be unnecessary because the child could be permitted to testify in less intimidating surroundings, albeit with the defendant present. Finally, the trial court must find that the emotional distress suffered by the child witness in the presence of the defendant is more than de minimis, i.e., more than 'mere nervousness or excitement or some reluctance to testify'. . . ." (Citations omitted.)

See also *In re Vanidestine,* 186 Mich App 205, 209–12 (1990) (*Craig* applied to juvenile delinquency case).

In *People v Burton,* 219 Mich App 278, 291 (1996), the Court of Appeals held that in extreme cases, allowing a victim-witness to testify via closed circuit television may not violate the defendant's rights of confrontation even though MCL 600.2163a; MSA 27A.2163(1), does not apply. *Burton* involved the savage sexual assault and beating of an adult victim who did not fall within

the definition of "disabled" in the statute. The Court of Appeals found that where the victim is "mentally and psychologically challenged and the nature of the assault is extreme," the state's interest in protecting such victims may be sufficient to limit the defendant's right to confront his accuser face-to-face. *Id.* at 289. The Court of Appeals also added that the state's interest in the proper administration of justice warranted limitation of the defendant's rights of confrontation. The trial court found that the victim would have been unable to testify in the defendant's presence. Without use of closed-circuit television to present the victim's testimony, the victim's preliminary examination testimony would have been read into the record at trial, depriving the defendant of his right to cross-examine the victim. *Id.* The Court of Appeals concluded that the trial court properly found that use of the alternative procedure was necessary to preserve the victim's testimony and protect her from substantial mental and emotional harm. *Id.* at 290–91.

8.7 Defendant's Right of Self-Representation and Cross-Examination of Victims

The right to represent oneself at a criminal trial is implicitly guaranteed by the Sixth Amendment. *Faretta v California,* 422 US 806; 95 S Ct 2525; 45 L Ed 2d 562 (1975). It is also specifically secured by Const 1963, art 1, § 13, and MCL 763.1; MSA 28.854. However, none of these provisions guarantees an absolute right of self-representation. The judge must exercise discretion in deciding whether to permit the defendant to represent himself or herself. *People v Henley,* 382 Mich 143, 148–49 (1969). *People v Anderson,* 398 Mich 361, 367–68 (1976), requires the judge to ensure that the defendant's request is unequivocal, that the defendant is knowingly, intelligently, and voluntarily asserting his or her right of self-representation, and that the defendant's self-representation will not disrupt, unduly inconvenience, or burden the court. See also *Faretta, supra,* at 834, n 46 (the court may terminate the self-representation of a defendant who engages in "serious and obstructionist misconduct").

Although no Michigan appellate court has addressed the issue, other courts have decided that if the trial court makes certain findings, a criminal defendant may be denied the opportunity to personally cross-examine a victim-witness without denying the defendant the right of self-representation. See, for example, the following cases:

F *Fields v Murray,* 49 F3d 1024 (CA 4, 1995)

*The *Craig* case is discussed in Section 8.6(C)(4), above.

The defendant was charged with sexually assaulting several girls, aged 11 through 13, including his daughter. Prior to trial, the defendant wrote a letter to the trial judge stating that he wished to act as co-counsel so that he could cross-examine the victim-witnesses. The trial court denied his request but ruled that it would allow the defendant to submit questions to his attorney to be read to the victim-witnesses during cross-examination. On appeal, the defendant argued that the trial court's ruling denied him his right of self-representation. *Id.* at 1026–28. The Court of Appeals assumed that the defendant properly invoked his right of self-representation but held that the trial court's refusal to allow the defendant to personally cross-examine the victim-witnesses did not deprive him of his right of self-representation. *Id.* at 1034. The Court of Appeals applied the test used in *Maryland v Craig,* 497 US 836; 110 S Ct 3157; 111 L Ed 2d 666 (1990),* to determine whether allowing child victims of sexual abuse to testify out of the defendant's presence denied the defendant the federal constitutional right of confrontation. To determine whether a trial court is required to allow the defendant to cross-examine the victim-witnesses, it must find:

1) that the elements of the right of self-representation, other than the right to question witnesses, will be "otherwise assured" by the alternative procedure to be used, and

2) that the denial of personal cross-examination of the witness is necessary to further an important public policy. *Fields, supra,* at 1035.

As to the first prong of the test, the Court in *Fields* concluded that the defendant's ability to present his chosen defense and the jury's perception that the defendant was representing himself or herself, two key elements of the right of self-representation, were "otherwise assured" by allowing him to submit written questions to be read to the victim-witnesses and to personally conduct all other parts of the case. *Id.* As to the second prong, the Court concluded that the state's interest in protecting child victims of sexual abuse from the trauma of cross-examination by their alleged abuser is "at least as great as, and likely greater than, the State's interest in *Craig* of protecting children from the emotional harm of merely having to testify in their alleged abuser's presence." *Id.* Moreover, because the likelihood of emotional trauma from being cross-examined by the alleged abuser is greater than that from being required to testify in the alleged abuser's presence, the trial court need not receive psychological evidence before denying the defendant the opportunity to personally cross-examine the witness. *Id.* at 1036–37.

F *State v Estabrook,* 842 P2d 1001 (Wash App, 1993)

The defendant was convicted of sexually assaulting a developmentally disabled victim, who was 15 years old at the time of trial, but whose "mental age" was 11. Defendant waived his right to counsel and represented himself at trial. Instead of allowing the defendant to personally cross-examine the

victim, the trial court directed the defendant to submit written questions, which the court then used to cross-examine the victim. The trial court advised the jury of the procedure to be used, allowed the defendant additional time to prepare the questions after direct examination of the victim, and refused to sustain any objections to the scope of the defendant's questions. *Id.* at 1004. On appeal, the Washington Court of Appeals concluded that the procedure used did not violate the defendant's right of self-representation. *Id.* at 1006. The Court of Appeals applied the test used in *McKaskle v Wiggins,* 465 US 168, 176–78; 104 S Ct 944; 79 L Ed 2d 122 (1984), a case considering whether unsolicited participation by standby counsel denies the pro-se defendant his or her right of self-representation. That test is as follows:

1) the defendant must retain actual control over the case he or she chooses to present to the jury, and

2) standby counsel's unsolicited participation must not destroy the jury's perception that the defendant is representing himself or herself. *Estabrook, supra,* at 1006.

In *Estabrook,* the Court concluded that the defendant maintained control over his defense through submission of the written questions to the judge. In addition, the judge's instructions to the jury emphasized that the defendant was representing himself despite the judge's asking questions of the victim-witness. *Id.*

F *Commonwealth v Conefrey,* 570 NE 2d 1384 (Mass, 1991)

A defendant charged with the sexual assault of his daughter represented himself at trial but was denied the opportunity to personally cross-examine the victim. Instead, the defendant directed questioning of the victim through his standby counsel. *Id.* at 1388–89. The Supreme Judicial Court of Massachusetts held that defendant's right of self-representation was violated by this procedure. *Id.* at 1389. The Court concluded that there was no record evidence that "the defendant intended to exploit or manipulate the right of self-representation for ulterior purposes," and the judge's mere belief that the victim-witness would be intimidated or harmed by the cross-examination was found insufficient to deny the defendant the opportunity to personally question the victim-witness. The Court stated, however, that if it were established during a separate hearing or during the cross-examination itself that the defendant would manipulate the questioning or that the victim would be harmed, then preventing the defendant's questioning of the victim would not violate his right of self-representation. *Id.* at 1390–91. The Court remanded for a new trial.

8.8 Cross-Examination Regarding Civil Suit Filed by Victim

Whether the victim of a crime has filed or is contemplating filing a civil lawsuit that may be affected by the outcome of the criminal case is relevant to the victim's credibility. It is therefore a proper subject for cross-examination. *People v Morton,* 213 Mich App 331, 334–35 (1995).*

*See Chapter 12 for a discussion of the relationship between criminal actions and related civil actions.

8.9 Evidence of the Victim's Character

A. Homicide Cases

In general, evidence of a person's character is not admissible to show that the person acted in conformity with his or her character at the time in question. MRE 404(a). However, in homicide cases,* evidence of an alleged victim's character may be admissible when self-defense is an issue in the case. The relevant rule of evidence, MRE 404(a)(2), states that the following evidence is admissible:

*See Section 8.9(B), below, for discussion of criminal sexual conduct cases.

> "When self-defense is an issue in a charge of homicide, evidence of a trait of character for aggression of the alleged victim of the crime offered by an accused, or evidence offered by the prosecution to rebut the same, or evidence of a character trait of peacefulness of the alleged victim offered by the prosecution in a charge of homicide to rebut evidence that the alleged victim was the first aggressor."*

*This version of MRE 404(a)(2) is effective September 1, 2001.

B. Criminal Sexual Conduct Cases

The general rule that evidence of a person's character is not admissible to show that the person acted in conformity with his or her character at the time of the offense applies with even greater force in criminal sexual conduct cases. Michigan Rule of Evidence 404(a)(3) severely limits the admission of evidence concerning the reputation or past sexual conduct of an alleged criminal sexual conduct victim. This rule limits admission to "evidence of the alleged victim's past sexual conduct with the defendant and evidence of specific instances of sexual activity showing the source or origin of semen, pregnancy, or disease" in a criminal sexual conduct case. The "rape shield statute," MCL 750.520j; MSA 28.788(10), adds that such evidence is admissible "only to the extent that the . . . proposed evidence is material to a fact at issue in the case and that its inflammatory or prejudicial nature does not outweigh its probative value." MCL 750.520j(1); MSA 28.788(10)(1).

> **Note:** The "rape shield statute" requires exclusion of the proffered evidence when its probative value is outweighed by its prejudicial effect. On the other hand, MRE 403 requires exclusion of relevant evidence "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading

the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." It is unclear which standard applies. Compare *People v Adair,* 452 Mich 473, 481 (1996) (the "rape shield statute" modifies the standard in MRE 403 in criminal sexual conduct cases), and *People v Hackett,* 421 Mich 338, 361–62 (1984) (Kavanagh, J, concurring) (MRE 404(a)(3) supersedes MCL 750.520j(1); MSA 28.788(10)(1), and MRE 403 must be applied.) For a general discussion of the relationship between the "rape shield statute" and MRE 404(a)(3), see *McDougall v Schanz,* 461 Mich 15, 44–46 (1999) (Cavanagh, J, dissenting).

The "rape shield statute" and MRE 404(a)(3) reflect a determination that "in the overwhelming majority of prosecutions, evidence of a rape victim's sexual conduct with parties other than the defendant, as well as the victim's sexual reputation, is neither an accurate measure of the victim's veracity nor determinative of the likelihood of consensual sexual relations with the defendant." *People v Powell,* 201 Mich App 516, 519 (1993). See also *People v Mustafa,* 95 Mich App 583, 588 (1980) (the limitations on character evidence in criminal sexual conduct cases apply to alleged victims of the defendant other than the complainant in the case before the court).

However, if the proffered evidence is relevant, cross-examination of the victim regarding past sexual history may be required to preserve the defendant's right of confrontation. In *People v Hackett,* 421 Mich 338, 348 (1984), the Michigan Supreme Court provided examples of circumstances in addition to those contained in MRE 404(a)(3) in which evidence of the victim's reputation or past sexual conduct may be admissible:

> "We recognize that in certain limited situations, such evidence may not only be relevant, but its admission may be required to preserve a defendant's constitutional right to confrontation. For example, where the defendant proffers evidence of a complainant's prior sexual conduct for the narrow purpose of showing the complaining witness' bias, this would almost always be material and should be admitted. . . . Moreover in certain circumstances, evidence of a complainant's sexual conduct may also be probative of a complainant's ulterior motive for making a false charge. . . . Additionally, the defendant should be permitted to show that the complainant has made false accusations of rape in the past." [Citations omitted.]

1. Procedure for Determining Admissibility

If the defendant in a criminal sexual conduct case proposes to offer evidence of the victim's past sexual conduct with the defendant or evidence of specific instances of sexual activity to show the source or origin of semen, pregnancy, or disease, the defendant must file a written motion and offer of proof within

10 days after arraignment. MCL 750.520j(2); MSA 28.788(10)(2). Violation of this time requirement may result in preclusion of the proposed evidence. *People v Lucas (On Remand),* 193 Mich App 298, 301 (1992) and *People v Lucas (After Remand),* 201 Mich App 717, 719 (1993). The court may conduct an in-camera hearing prior to trial to determine the admissibility of the proposed evidence. In addition, if new information is discovered during trial that may make the proposed evidence admissible, the court may conduct an in-camera hearing during trial. MCL 750.520j(2); MSA 28.788(10)(2).

If the defendant proposes to offer evidence of the victim's past sexual conduct with third persons, the court must determine whether admission of the evidence is necessary to preserve the defendant's constitutional right of confrontation. The procedure to be followed in determining admissibility of this evidence was set forth in *People v Hackett,* 421 Mich 338, 350–51 (1984):

> "The defendant is obligated initially to make an offer of proof as to the proposed evidence and to demonstrate its relevance to the purpose for which it is sought to be admitted. Unless there is a sufficient showing of relevancy in the defendant's offer of proof, the trial court will deny the motion. If there is a sufficient offer of proof as to a defendant's constitutional right to confrontation, as distinct simply from use of sexual conduct as evidence of character or for impeachment, the trial court shall order an *in camera* evidentiary hearing to determine the admissibility of such evidence in light of the constitutional inquiry previously stated. At this hearing, the trial court has, as always, the responsibility to restrict the scope of cross-examination to prevent questions which would harass, annoy, or humiliate sexual assault victims and to guard against mere fishing expeditions. . . . We again emphasize that in ruling on the admissibility of the proffered evidence, the trial court should rule against the admission of evidence of a complainant's prior sexual conduct with third persons unless that ruling would unduly infringe on the defendant's constitutional right to confrontation." [Citations omitted.]

2. Cases Deciding What Constitutes "Sexual Conduct" With Persons Other Than the Defendant

Both MRE 404(a)(3) and the "rape shield statute" prohibit admission of evidence describing the victim's "sexual conduct" with persons other than the defendant. In *People v Wilhelm (On Rehearing),* 190 Mich App 574 (1991), the defendant observed the victim expose her breasts to two men at a bar. She also allowed one of the men to fondle her breasts. The Court of Appeals first rejected the defendant's argument that the public nature of the victim's conduct removed it from the scope of the "rape shield statute." *Id.* at 584. The Court also held that the victim's exposure of her breasts and allowing another

to fondle them was "sexual conduct." *Id.* at 585. Finally, the court held that the defendant's viewing of the victim's "sexual conduct" did not constitute conduct between the victim and the defendant. *Id.* at 585.

In *People v Ivers,* 459 Mich 320 (1998), a defendant charged with first-degree criminal sexual conduct sought to introduce testimony by the victim's friend that on the night of the alleged offense the victim said that she had discussed birth control with her mother and was "ready to have sex." Defendant also sought to introduce testimony by the victim's friend that the victim had asked her friend to "get her a guy" on the night of the alleged assault. *Id.* at 323–25. The Michigan Supreme Court held that these statements were not "sexual conduct." *Id.* at 328. The Court did note, however, that a victim's statements could fall under the statute if they amounted to or referenced specific conduct. *Id.* at 329. Justice Boyle, concurring, pointed out that the statements were hearsay and suggested that they may have been inadmissible under MRE 803(3), which allows admission of statements showing the declarant's future intent. *Id.* at 331–32.*

*See Section 8.11(C), below, for discussion of MRE 803(3).

3. The Admissibility of Sexual Conduct With the Defendant That Occurred After the Charged Conduct

Consensual conduct between the defendant and the complainant that occurred after the alleged criminal conduct may be admissible at trial. *People v Adair,* 452 Mich 473, 483 (1996). In *Adair,* the Michigan Supreme Court held that the phrase "past sexual conduct with the actor" in the "rape shield statute" included conduct that occurred after the charged act but before trial. Evidence of such conduct may be admitted if it is material to an issue in the case, and its probative value is not outweighed by its prejudicial nature.* In balancing these considerations, the trial court should consider the time that elapsed between the charged and the subsequent conduct, whether a personal relationship existed between the defendant and the complainant, and "other human emotions intertwined with the relationship" that may have led to the subsequent conduct. *Id.* at 486–87. Compare *People v Stull,* 127 Mich App 14, 16–18 (1983) (evidence that the complainant had sexual intercourse with a third party seven hours after the alleged assault was inadmissible).

*See Section 8.9(B), Note, for a discussion of the appropriate standard for balancing the probative value and prejudicial nature of the evidence.

4. The Admissibility of Evidence Explaining the Victim's Physical Condition

If the prosecutor introduces evidence that the victim does not have an intact hymen to prove that the alleged penetration occurred, the defendant may be allowed to present evidence of the victim's prior sexual activity to show an alternative explanation for the victim's physical condition. *People v Mikula,* 84 Mich App 108, 113–15 (1978), and *People v Haley,* 153 Mich App 400, 405 (1986). The Court in *Mikula* construed MCL 750.520j(1)(b); MSA 28.788(10)(1)(b), which allows admission of evidence of sexual activity showing "the source or origin of semen, pregnancy, or disease." The Court reasoned that the evidence offered was no more harassing than the types of evidence listed in the statute and was used for the same purposes (to establish and to rebut the inference that the defendant is guilty). See also *People v*

Garvie, 148 Mich App 444, 449 (1986) (the rule established in *Mikula* may be extended to the prior sexual abuse of a child explaining a change in the child's disposition).

Evidence of the victim's virginity is inadmissible under MRE 404(a)(3) to demonstrate that, because of her or his sexual inexperience, the victim was less likely to have consented to the alleged criminal sexual conduct. *People v Bone,* 230 Mich App 699, 702 (1998).

5. Cases Addressing the Defendant's Rights to Confrontation and to Present a Defense

In cases involving child victims of criminal sexual conduct, evidence of prior sexual conduct with a third person may be admissible to show the child's age-inappropriate sexual knowledge or motive to make false charges. In *People v Morse,* 231 Mich App 424 (1998), the defendant sought to introduce evidence showing that three years before the present case a person had pled guilty to molesting the children involved in the present case. The conduct involved in the earlier case was "highly similar" to the conduct involved in the present case. *Id.* at 428. The Court of Appeals held that evidence of a child's prior sexual conduct may be admissible if certain safeguards are followed. *Id.* at 436. To obtain an in-camera hearing, the defendant must make an offer of proof of the relevance of the proffered evidence. *Id.* at 437, citing *People v Byrne,* 199 Mich App 674, 678 (1993). At an in-camera hearing, the court must determine whether "(1) defendant's proffered evidence is relevant, (2) defendant can show that another person was convicted of criminal sexual conduct involving the complainants, and (3) the facts underlying the previous conviction are significantly similar to be relevant to the instant proceeding." *Morse, supra,* at 437. In addition, if the evidence is deemed admissible, the trial court may consider alternate means of admitting the evidence, such as eliciting testimony from another witness, introducing documents from the previous conviction, or by stipulation. *Id.* at 438. See also *People v Haley,* 153 Mich App 400, 403 (1986) (where defendant was allowed to show the jury pornographic movies viewed by the child complainant and depicting the charged acts, defendant's right to present a defense was preserved).

Evidence of prior false accusations of improper sexual conduct made by the victim may be admissible. *People v Makela,* 147 Mich App 674, 685 (1985), and *People v Williams,* 191 Mich App 269, 271–74 (1991) (defendant failed to offer sufficient evidence of prior false accusation to obtain an evidentiary hearing).

Where defendant alleges that the victim is a prostitute and consented to the alleged conduct in exchange for money, evidence of the victim's reputation or past sexual conduct may be admissible. In *People v Slovinski,* 166 Mich App 158, 163 (1988), the defendant sought to introduce testimony from two witnesses showing that the victim associated with known prostitutes, and that the victim had solicited acts of prostitution. The Court of Appeals held that the testimony was admissible under MRE 404(a)(3) to establish the defense of

"financially induced consent." *Id.* at 179. The Court reasoned that evidence of the victim's status as a prostitute was probative of the issue of consent, and that its probative value outweighed the danger of unfair prejudice. *Id.* at 178–79. The Court also held that exclusion of the evidence would violate the defendant's procedural due process rights by precluding the defendant's only defense. *Id.* at 180.

In *People v Powell,* 201 Mich App 516, 518 (1993), the defendant sought to introduce evidence that the victim was a topless dancer, testimony from a witness that the victim associated with alleged prostitutes, and testimony from the defendant that the victim solicited defendant two months after the alleged offense. The Court of Appeals held that the proffered evidence was inadmissible under MCL 750.520j(1); MSA 28.788(10)(1). The victim's alleged employment as a topless dancer and association with known prostitutes were not probative of the issue of whether she was a prostitute. The defendant's proposed testimony was suspect, and the probative value of all of the proposed testimony was outweighed by its prejudicial effect. *Id.* at 520.

8.10 Expert Testimony on the Psychological Effects of Battering and Criminal Sexual Conduct

Michigan Rules of Evidence 702 to 707 govern the use of expert testimony at trial. MRE 702 provides the standard for admissibility of expert testimony:

> "If the court determines that recognized scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion or otherwise."

In *People* v *Beckley,* 434 Mich 691, 711 (1990), the Supreme Court articulated the following three-part test for admissibility of expert testimony under MRE 702:

F The expert must be qualified.

There are two basic types of expert witnesses—those with academic training, and those with practical experience. Witnesses with either background may be qualified to testify if they demonstrate understanding of the particular fact situation. *People v Boyd*, 65 Mich App 11, 14–15 (1975). Whether a witness's expertise is as great as that of others in the field is relevant to the weight rather than the admissibility of the testimony and is a question for the jury. *Grow v W A Thomas Co,* 236 Mich App 696, 713–14 (1999) (the trial court did not err in qualifying a certified social worker to testify regarding post-traumatic stress disorder).* In cases involving sexual abuse of children, expert testimony has been presented by physicians, crisis counsellors, social workers, police officers, and

*For jury instructions on the weight that a juror should give to expert testimony, see CJI2d 5.10 and 20.29 (for child sexual abuse cases).

psychologists. See *People* v *Beckley,* 434 Mich 691, 711 (1990), and cases cited therein.

F The evidence must give the trier of fact a better understanding of the evidence or assist in determining a fact in issue.

Expert testimony must be helpful and relevant to explain matters not readily comprehensible to an average juror. In *People v Christel*, 449 Mich 578, 591 (1995), the Michigan Supreme Court held that in an appropriate case, an expert may explain the generalities or characteristics of the battered woman syndrome, so long as the testimony is limited to a description of the uniqueness of a specific behavior brought out at trial. Such behavior may include prolonged endurance of abuse, attempts to hide or minimize abuse, delays in reporting abuse, or recanting allegations of abuse. The expert's testimony must be limited to generalities, however. An expert may not opine that the complainant in a case is a battered woman, that the defendant is a batterer, or that the defendant is guilty of the crime charged. Moreover, an expert may not comment on whether the complainant is being truthful. See also *People v Wilson,* 194 Mich App 599, 605 (1992), and *People v Beckley*, 434 Mich 691, 725–28 (1990), in which the Supreme Court reached a similar conclusion regarding expert testimony about "child sexual abuse accommodation syndrome." Common characteristics observed in child victims of sexual abuse include secrecy; helplessness; entrapment and accommodation; delayed, conflicted, and unconvincing disclosure; and retraction. *People v Peterson,* 450 Mich 349, 373, n 12 (1995).

F The evidence must be from a recognized discipline.

In general, expert testimony based on scientific principles or techniques is subject to the "*Davis/Frye* rule," which is based on *Frye v United States*, 54 US App DC 46; 293 F 1013 (1923), and *People v Davis*, 343 Mich 348 (1955). Under this rule, testimony based on a novel scientific principle or technique may be admitted into evidence only after the trial court has held a hearing to determine its reliability as a threshold matter. The *Davis/Frye* rule has not been applied to certain evidence gained from the behavioral sciences, however. See *People* v *Beckley,* 434 Mich 691, 718–21 (1990) (opinion of Brickley, J), in which a majority of the Michigan Supreme Court Justices agreed that the *Davis/Frye* rule should not be applied to "child sexual abuse accommodation syndrome" evidence. But see *People v Hubbard*, 209 Mich App 234, 242, n 2 (1995), in which a Court of Appeals panel expressed its disagreement with these Justices.

If the court determines that the expert testimony meets the foregoing three-part test, it must next determine whether the probative value of the expert testimony outweighs the danger of unfair prejudice. MRE 403 provides that relevant evidence may be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." However, on request, the trial judge may deem a limiting instruction an appropriate alternative to excluding the evidence. *People v Christel*, 449 Mich 578, 587 (1995).

Note: In *Christel*, the Supreme Court stated that the danger of unfair prejudice was dispelled by the limitations the Court imposed on the scope of an expert's testimony regarding battered woman syndrome, discussed below. *Id.* at 591, n 24.

The following cases discuss the admissibility of expert testimony regarding the behavior of a victim following victimization. This discussion does not include testimony by a medical expert regarding "battered child syndrome." "Battered child syndrome" is a widely recognized medical diagnosis that indicates that a child has been injured by nonaccidental means. The diagnosis does not suggest that a particular person, such as a parent, guardian, or custodian, inflicted the injury. *People v Barnard,* 93 Mich App 590, 593 (1979), and *People v Barnwell,* 60 Mich App 291, 292 (1975). The Court of Appeals has held that evidence of battered child syndrome is admissible to show that a child has suffered nonaccidental physical injury. *Barnard, supra.*

A. Cases Addressing the Psychological Effects of Battering on Adults

Expert testimony on battering and its effects may be used by either the prosecutor or defendant in criminal cases. The Michigan appellate courts have considered the admissibility of expert testimony on battering and its effects in the following cases.

- *People v Christel,* 449 Mich 578 (1995) (prosecutor seeks to explain the behavior of the alleged victim):

The defendant in *Christel* was convicted of first-degree criminal sexual conduct against his former intimate partner. On appeal, he asserted that the trial court erred in admitting testimony about the battered woman syndrome from a clinical psychologist trained in the field of domestic violence. The prosecution offered this testimony at trial to help evaluate the complainant's credibility, and to rebut defendant's claims that the complainant was a liar, a self-mutilator, and an embezzler. The psychologist testified that women often remain in an intimate relationship even though abuse is occurring. As the abuse escalates over time, they may deny, repress, or minimize it rather than express outrage. The Supreme Court concluded that the trial court erred in admitting this testimony because the requisite factual underpinnings for its introduction were lacking. The Court found that the complainant had ended her relationship with the defendant one month prior to the assault, and did not try to hide or deny the assault. Moreover, she did not delay reporting the crime, but immediately sought medical attention with accompanying discussions with police. The complainant also never recanted her testimony that the assault occurred. Under these circumstances, the expert testimony was not relevant because the complainant's actions were not characteristic of battered woman syndrome.

F *People v Daoust,* 228 Mich App 1 (1998) (prosecutor seeks to explain the behavior of a witness to an alleged crime):

The defendant was charged with two counts of first-degree child abuse based on injuries to the head and hand of his girlfriend's daughter. In addition to these injuries, the child also suffered numerous bruises. During the initial stages of the investigation, the child's mother denied involvement with the defendant, and admitted responsibility for some of the bruises on the child's body. However, at defendant's trial she testified that the injuries to the child's head and hand were suffered while the child was in the care of the defendant. She further stated that the defendant had threatened to harm her and the child if she sought medical attention for the child's injuries, and that she had attempted to deflect the blame for the injuries away from the defendant because she was afraid of him.

A jury convicted defendant of second-degree child abuse based on the injury to the child's hand. On appeal, defendant challenged the trial court's decision to admit expert testimony regarding the battered woman syndrome, asserting that the testimony was not relevant and helpful to the trier of fact. The testimony, given by the executive director of a domestic violence, sexual assault, and child abuse center, described the dynamics of relationships involving women who live under threat of physical or sexual violence. The witness explained that certain types of control mechanisms apart from physical violence are often present in such relationships, and that a woman could fall into a pattern of abuse without ever being hit. She further stated that it was quite common for a woman in this type of relationship to lie in order to protect her partner. Thus, she opined that a woman in this situation might falsely take the blame for abusing her own child because she may fear that exposing the truth will result in even greater abuse.

The Court of Appeals upheld the trial court's decision to admit the expert testimony, finding that the circumstances described by the expert corresponded to circumstances described by the child's mother. Although the child's mother testified that defendant had never actually hit her, she also stated that the defendant: 1) verbally abused her; 2) threatened to harm her and her child; 3) paid close attention to her whereabouts, discouraging her from seeing her friends; 4) controlled her access to her own money; 5) threatened to beat up the child's baby-sitter for making reports to Child Protective Services about bruises on the child's body; and 6) forced her to perform oral sex on him against her will. The mother also stated that she was afraid to leave the defendant because of his threats. In light of the mother's testimony, the Court of Appeals found that the expert testimony was "relevant and helpful to explain why [the mother] might have initially sought to deflect the blame for her daughter's injuries away from the defendant while knowing he was responsible." *Id.* at 11.

F *People v Wilson,* 194 Mich App 599 (1992) (defendant seeks to prove that she committed murder in self defense):

The defendant admitted to shooting her husband while he slept, claiming that she acted in self-defense. Prior to her trial on murder charges, defendant moved to admit expert testimony regarding the "battered spouse syndrome" (BSS). She asserted that this testimony was essential to establish that she acted in self-defense following 48 hours of abuse and death threats and years of battery. The people appealed from the trial court's interlocutory order granting defendant's motion. The Court of Appeals held that the proffered testimony was relevant and helpful because it would give the jury a better understanding of whether defendant reasonably believed her life was in danger, and whether she could have left her husband. Having so held, however, the Court of Appeals limited the parameters of the testimony. Citing *People v Beckley*, 434 Mich 691,726–27, 729 (1990), the Court of Appeals stated:

> "Because an expert regarding the child sexual abuse accommodation syndrome is an expert with regard to the syndrome and not the victim, it is inappropriate for that expert to render an opinion regarding whether the victim actually suffers from the syndrome. However, the Court in *Beckley* held the expert could render an opinion that the victim's behavior is common to the class of child abuse victims as long as the symptoms are already established in evidence. The expert may not introduce new facts about the victim unless those facts are properly admitted under a rule other than MRE 702. . . . We believe the same limitations should apply to experts who testify about the BSS. As with the child abuse syndrome, the BSS expert is an expert with regard to the syndrome and not the particular defendant. Thus, the expert is qualified only to render an opinion regarding the 'syndrome' and the symptoms that manifest it, not whether the individual defendant suffers from the syndrome or acted pursuant to it." *Id.* at 605.

Under the foregoing guidelines, the defendant's expert was not allowed to offer an opinion whether the defendant suffered from BSS, or whether her act was the result of the syndrome. The expert was further restricted from testifying whether the defendant's allegations of battery were truthful, this being an issue of credibility for the jury.

> **Note:** To establish self-defense, a defendant must honestly and reasonably believe that his or her life is in imminent danger or that there is a threat of serious bodily harm. *People v Heflin*, 434 Mich 482, 502 (1990).

- **F** *People v Moseler,* 202 Mich App 296 (1993) (defendant seeks to prove that the charged crime was committed under duress):

On appeal from her conviction of vehicular manslaughter, the defendant claimed that she had been driving recklessly to escape her boyfriend. On the date of the accident that led to the charges, defendant had argued with her boyfriend, and inadvertently backed her car into his car. He became angry and threatened to "kick her ass." She drove away at a high rate of speed, with her boyfriend in pursuit. She ran four red lights and struck another vehicle, killing the driver of this vehicle. Defendant stated that she had been beaten by her boyfriend in the past, and feared that he would carry out his threat to "kick her ass." She further asserted that she was denied effective assistance of counsel because her attorney did not introduce evidence of the "battered women's syndrome" to show that her actions were the result of duress. The Court of Appeals rejected defendant's argument as follows:

> "[Defendant] was the one who drank six beers before confronting [her boyfriend], she was the one who backed her car into his car, and she was the one who elected to drive in excess of the speed limit and to run red lights rather than adopt any of the other options available to her. On the basis of the existing record, we do not find any error in counsel's trial strategy that prejudiced defendant's case." *Id.* at 299.

The Court of Appeals further rejected defendant's argument that the trial court erroneously failed to instruct the jury on duress, stating that duress is not a valid defense to homicide. *Id*.

B. Cases Addressing the Psychological Effects of Sexual Assault on Adults and Children

Where the defendant raises an alibi defense, expert testimony regarding "rape trauma syndrome" is inadmissible to prove that a sexual assault occurred. However, in any case, lay testimony regarding emotional and psychological trauma suffered by the complainant is admissible on the issue of whether the alleged sexual assault occurred. *People v Pullins,* 145 Mich App 414, 421–22 (1985). In *Pullins,* the Court of Appeals did not decide whether expert testimony on "rape trauma syndrome" was admissible when the defense is consent. *Id.* at 422.

In *People v Beckley,* 434 Mich 691, 724, 729 (1990), a majority of the justices concluded that "child sexual abuse accommodation syndrome" evidence is unreliable as an indicator of abuse and inadmissible to show that sexual abuse has occurred, and that an expert witness may not testify that the victim's allegations are true. A plurality of the justices held that an expert witness may testify that the particular behavior of the allegedly sexually abused child was characteristic of sexually abused children in general. However, this plurality of justices concluded that such testimony is only admissible to rebut an

inference that a victim's behavior following the incident was inconsistent with that of a sexually abused child. *Id.* at 710.

In *People v Peterson,* 450 Mich 349 (1995), modified 450 Mich 1212, the Michigan Supreme Court modified its holding in *Beckley, supra.* In *Peterson, supra,* at 352, the Court reaffirmed its holding in *Beckley* that an expert witness in a child sexual abuse case may not testify that the alleged conduct occurred or that the allegations are true. The Court in *Peterson* then modified *Beckley* by allowing expert testimony in the prosecutor's case-in-chief rather than only as rebuttal evidence:

> "An expert may testify regarding typical symptoms of child sexual abuse for the sole purpose of explaining a victim's specific behavior that might be incorrectly construed by the jury as inconsistent with that of an abuse victim *or* to rebut an attack on the victim's credibility.
>
> . . . .
>
> "We hold that the prosecution may present evidence, if relevant and helpful, to generally explain the common postincident behavior of children who are victims of sexual abuse. The prosecution may, in commenting on the evidence adduced at trial, argue the reasonable inferences drawn from the expert testimony and compare the expert's testimony to the facts of the case. Unless a defendant raises the issue of the particular child victim's postincident behavior or attacks the child's credibility, an expert may not testify that the particular child victim's behavior is consistent with that of a sexually abused child." *Peterson, supra,* at 373–74. (Emphasis in original; footnotes omitted.)

In one of the cases consolidated in *Peterson,* the Michigan Supreme Court found "an almost perfect model for the limitations that must be set in allowing expert testimony into evidence in child sexual abuse cases." *Id.* at 381. In that case, the victim delayed reporting the abuse for five years, but the defendant did not ask the victim any questions suggesting that the delay in reporting was inconsistent with the alleged abuse or attack the victim's credibility. The trial court allowed a single expert to clarify, during the prosecutor's case-in-chief, that child sexual abuse victims frequently delay reporting the abuse. The expert's testimony helped to dispel common misperceptions held by jurors regarding the reporting of child sexual abuse, rebutted an inference that the victim's delay was inconsistent with the behavior of a child sexual abuse victim, and did not improperly bolster the victim's credibility. *Id.* at 379–80. For a case in which an expert witness improperly vouched for the child's credibility, see *People v Garrison (On Remand),* 187 Mich App 657, 659 (1991) (expert witness testified that child's use of anatomically correct dolls "demonstrated that she had indeed been sexually abused").

In *People v Lukity,* 460 Mich 484, 500–01 (1999), the defendant was convicted of sexually abusing his 14-year-old daughter, who testified at trial that she attempted suicide after the assaults. In his opening statement, defense counsel stated that the complainant had emotional problems unrelated to sexual abuse that made her allegations incredible. The Michigan Supreme Court applied *Peterson* and held that because the defendant raised the complainant's postincident behavior, the trial court properly allowed an expert witness to testify that the victim's suicide attempt was consistent with the behavior of a child sexual abuse victim.

8.11 Admissible Hearsay Statements by Crime Victims

Hearsay is "testimony that is given by a witness who relates not what he or she knows personally, but what others have said, and that is therefore dependent on the credibility of someone other than the witness." *Black's Law Dictionary* (St. Paul, MN: West, 7th ed, 1999), p 726. The Michigan Rules of Evidence generally prohibit the admission of hearsay evidence unless it falls under one of numerous exceptions to the "hearsay rule." See MRE 801(c) (definition of hearsay), MRE 801(d) (definition of "non-hearsay), and MRE 802 (hearsay not admissible except as provided by the rules of evidence). It should be noted that even if a hearsay statement is deemed admissible under an exception to the "hearsay rule," the evidence may be excluded on other grounds. See, for example, MRE 403 (evidence is inadmissible "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence").

This section addresses exceptions to the hearsay prohibition that allow the hearsay statements of crime victims made near to the time of the offense to be admitted at trial. The exceptions discussed are:

- present sense impressions;
- excited utterances;
- statements of then existing mental, emotional, or physical condition;
- statements made for purposes of medical diagnosis or treatment
- statements corroborating a child's statement about a sexual act;
- statements under belief of impending death; and
- statements by a declarant made unavailable as a witness by a party's misconduct.

A. "Present Sense Impressions"

"A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter," is admissible under the "present sense impression" exception to the hearsay rule. MRE 803(1). "Present sense impressions" are not excluded by the hearsay rule even though the declarant is available as a witness. *Id.* The Michigan Supreme Court has allowed the admission of a statement made four minutes after the event described. *Johnson v White,* 430 Mich 47, 56–57 (1988).

This exception may allow the admission of victims' statements describing or explaining criminal acts by telephone to emergency operators. See, generally, *City of Westland v Okopski,* 208 Mich App 66, 77–78 (1994) (a tape of an emergency call was properly admitted to show why police responded, rather than to prove the truth of the assertions on the tape, and the taped statements, even if hearsay, were present sense impressions under MRE 803(1)), and *People v Hendrickson,* 459 Mich 229, 237–40 (1998) (before a tape of statements to an emergency operator could be admitted at trial, independent evidence of the alleged assault was required, but photographs showing the victim's injuries that were consistent with the assault described to the emergency operator satisfied this requirement).

Statements by victims describing or explaining criminal acts by telephone to emergency operators may also be admissible as "excited utterances" under MRE 803(2). *People v Slaton,* 135 Mich App 328, 334–35 (1984) (statements by murder victim to 911 operator that someone was trying to break down a door and enter the victim's house were admissible as "excited utterances").

B. "Excited Utterances"

MRE 803(2) allows admission of statements "relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition." Such statements are admissible even though the declarant is available as a witness. There are three requirements that a statement must meet to be admissible:

> "'To come within the excited utterance exception to the hearsay rule, a statement must meet three criteria: (1) it must arise out of a startling occasion; (2) it must be made before there has been time to contrive and misrepresent; and (3) it must relate to the circumstances of the startling occasion.'" *People v Straight,* 430 Mich 418, 424 (1988), quoting *People v Gee,* 406 Mich 279, 282 (1979) (footnote omitted).

Sexual assault may be a startling event for purposes of this rule. *People v Crump,* 216 Mich App 210, 213 (1996). The Court of Appeals has held that a statement by a murder victim to the police that he had been shot and

identifying the perpetrator related to a "startling event." *People v Anderson,* 209 Mich App 527, 535 (1995).

The Michigan Supreme Court has also required that there be independent evidence of the startling event before the statement may be admitted. *People v Burton,* 433 Mich 268, 280 (1989). See also *People v Kowalak (On Remand),* 215 Mich App 554, 559–60 (1996) (requirement of independent evidence of startling event may be met with circumstantial evidence), and *People v Layher,* 238 Mich App 573, 583 (1999).

The amount of time that passes between the event and the statement is not by itself determinative of the admissibility of statements under this exception. Instead, the court should focus on the declarant's "lack of capacity to fabricate, not the lack of time to fabricate." *People v Smith,* 456 Mich 543, 551 (1998). The issue is "whether the circumstances surrounding the making of the statement suggest reliability and lack of opportunity for the deliberation and preparation attendant to giving a false statement." *People v Hackney,* 183 Mich App 516, 522 (1990).

In *Hackney, supra,* at 519, the Court of Appeals held that statements by the seven-year-old sexual assault victim made three to four hours after the assault were admissible. Between the time of the assault and the statements, the victim engaged in normal child's play, and the statements were made in response to limited questioning. *Id.* at 523. However, subsequent statements by the victim to the victim's mother were inadmissible because they were not made while under the influence of the startling event and were made in response to more intense questioning by the victim's mother. *Id.* at 525–26.

In general, the factors influencing appellate decisions on the admissibility of "excited utterances" include the declarant's age* and mental capacity, whether the declarant was threatened, whether the statements were spontaneous, and the time lapse between the statements and the startling event. See, for example, the following cases:

*If the statements describe a sexual act and corroborate statements that were made by a child under 10 years of age, they may be admissible under MRE 803A. See Section 8.11(E), below.

- *People v Layher,* 238 Mich App 573, 583–84 (1999) (statements made by five-year-old learning disabled victim induced by use of anatomically correct dolls during therapy session held one week after sexual assault were properly admitted);
- *People v Creith,* 151 Mich App 217, 222–25 (1986) (adult victim's statements made two to nine-and-a-half hours after the assault that led to his death were inadmissible despite the victim being in physical pain during this time);
- *People v Garland,* 152 Mich App 301, 307 (1986) (statements by seven-year-old victim of sexual abuse made one day after event were admissible where child had limited mental ability and was threatened);

- *People v Houghteling,* 183 Mich App 805, 806–08 (1990) (statements of five-year-old made 20 hours after sexual assault in response to mother's questions were admissible);
- *People v Smith,* 456 Mich 543, 549–55 (1998) (statements made 10 hours after sexual assault and in response to unrelated questioning were admissible);
- *People v Lovett,* 85 Mich App 534, 543–45 (1978) (statements by three-year-old witness to sexual assault-murder made one week after it occurred were admissible; child stayed with grandparents during the interval between event and statements, and statements were spontaneous);
- *People v Soles,* 143 Mich App 433, 438 (1985) (statements made five days after particularly heinous sexual assault were admissible);
- *People v Draper,* 150 Mich App 481, 486 (1986) (statements by three-year-old made a week after sexual assault by stepfather were admissible);
- *People v Zysk,* 149 Mich App 452, 456–57 (1986) (18-year-old victim's statements made three hours after brutal sexual assault admissible);
- *People v Straight,* 430 Mich 418, 423–28 (1988) (statements regarding sexual abuse made one month after event, during examination, and in response to repeated questioning were inadmissible); and
- *People v Scobey,* 153 Mich App 82, 85 (1986) (statements by 13-year-old two and five days after event were inadmissible).

C. Statements of Existing Mental, Emotional, or Physical Condition

MRE 803(3) allows admission of statements "of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will." Such statements are admissible even though the declarant is available as a witness.

The declarant's state of mind must be at issue in the case before statements showing state of mind may be admitted under MRE 803(3). *People v White,* 401 Mich 482, 502 (1977) (victim's statements showing his fear of the defendant were inadmissible where defendant raised an alibi defense), and *People v Lucas,* 138 Mich App 212, 220 (1984) (testimony of police officer that he believed a defendant's alibi witnesses inadmissible under MRE 803(3)).

In *People v Fisher,* 449 Mich 441 (1995), a murder victim made oral and written statements that she was unhappily married to the defendant, and that she intended to go to Germany to visit her lover and, upon her return, to divorce the defendant. The Michigan Supreme Court held that the victim's statements that were known to the defendant were admissible to show their effect on the defendant and were relevant to motive. Such statements were not hearsay because they were not to be used for their truth but only to show their effect on the defendant. The victim's statements that were not known to the defendant were admissible under MRE 803(3) to show the victim's intent, plan, or mental feeling. *Id.* at 450.

In *People v Howard,* 226 Mich App 528, 554 (1997), the Court of Appeals concluded that a page from a murder victim's appointment book listing the house where she was killed next to the time that she was killed was admissible under MRE 803(3) to show the victim's intent, at the time the entry was written, to go to the house. Statements showing a victim's intent may also be admissible to show the victim's subsequent conduct when that conduct is at issue in the case. See *People v Furman,* 158 Mich App 302, 315–16 (1987), citing *Mutual Life Ins Co of New York v Hillmon,* 145 US 285; 12 S Ct 909; 36 L Ed 706 (1892).

In *Furman, supra,* at 317, the Court of Appeals held that the murder victim's statements indicating her fear, dread, or nervousness of visiting an unidentified male (allegedly the defendant) were inadmissible under MRE 803(3). The statements described the victim's memories of previous contact with the man, and the victim's state of mind was not at issue in the case because the defendant claimed that he was not the perpetrator.

D. Statements Made for Purposes of Medical Treatment or Diagnosis

Under MRE 803(4), "[s]tatements made for purposes of medical treatment or medical diagnosis in connection with treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably necessary to such diagnosis and treatment," also constitute an exception to the "hearsay rule." Such statements are admissible even though the declarant is available as a witness.

MRE 803(4) assumes that people seeking medical attention will not fabricate because they understand the connection between speaking truthfully to health care providers and receiving proper medical care. *People v Meeboer (After Remand)*, 439 Mich 310, 322–23 (1992). In *Meeboer,* the Supreme Court listed four prerequisites to admissibility under MRE 803(4), which establish that a hearsay statement is: 1) inherently trustworthy; and 2) necessary for obtaining adequate medical diagnosis and treatment:

- the statement was made for purposes of medical treatment or diagnosis in connection with treatment;

- the statement describes medical history, past or present symptoms, pain or sensations, or the inception or general character of the cause or external source of the injury;
- the statement is supported by the "self-interested motivation to speak the truth to treating physicians in order to receive proper medical care"; and
- the statement is reasonably necessary to the diagnosis and treatment of the patient.

In recent years, the most serious concerns regarding the trustworthiness and necessity of hearsay statements to health care providers have arisen in three types of cases, all of which involve criminal sexual conduct:

- Cases where the declarant was under ten years of age.
- Cases where the statement was made to a psychologist.
- Cases where the statement identified the defendant as the declarant's assailant.

This section will discuss the Michigan appellate opinions addressing trustworthiness and necessity in these types of cases.

1. Declarant Under Age Ten

In cases involving children, Michigan's appellate courts have been most concerned with the trustworthiness of statements to physicians. For persons over ten years of age, a rebuttable presumption arises that they understand the need to tell doctors the truth. *People v Van Tassel (On Remand),* 197 Mich App 653, 662 (1992). In cases involving younger children, however, the trial court must inquire into the child's understanding of the need to be truthful with his or her physician. *People v Meeboer (After Remand)*, 439 Mich 310, 326 (1992).* In *Meeboer*, the Supreme Court consolidated three criminal sexual conduct cases involving complainants aged seven and under. The Court held that an inquiry into the trustworthiness of a child's statement to a physician must "consider the totality of circumstances surrounding the declaration of the out-of-court statement." *Id.* at 324. Factors to consider include: the age and maturity of the child; the manner in which the statements are elicited; the manner in which the statements are phrased; the use of terminology unexpected of a child of similar age; the circumstances surrounding the initiation of the examination; the timing of the examination in relation to the assault or trial; the type of examination; the relation of the declarant to the person identified as the assailant; the existence of or lack of motive to fabricate; and, corroborative evidence relating to the truth of the child's statement. *Id.* at 324–26.

*See Section 8.11(E), below, for a discussion of MRE 803A, which also applies to statements corroborating statements describing sexual abuse made by children under 10 years of age.

> **Note:** In *People v Van Tassel, supra,* the Court of Appeals found that the *Meeboer* factors had no application in a criminal sexual conduct case involving the defendant's 13-year-old daughter.

> Nonetheless, the Court applied the *Meeboer* factors to conclude that the trial court properly admitted the testimony of a nurse who participated in a medical examination of the complainant ordered by the probate court in a separate abuse/neglect proceeding. The Court found the complainant's hearsay statements trustworthy in light of the *Meeboer* factors. *Van Tassel, supra,* at 663–64.

2. Statements to Psychologists

Cases involving psychological examinations also raise concerns over trustworthiness. In *People v LaLone*, 432 Mich 103 (1989), a criminal sexual conduct case, the Supreme Court overturned a trial court's decision to admit the testimony of a psychologist who treated the 14-year-old complainant. One reason given for the Supreme Court's decision was the difficulty in determining the trustworthiness of statements to a psychologist. *Id.* at 109–110 (opinion of Brickley, J). The Supreme Court subsequently revisited this question in *People v Meeboer (After Remand)*, 439 Mich 310, 327 (1992), reiterating its belief that statements to psychologists may be less reliable than statements to physicians. However, the Court also noted that "the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment." *Id.* at 329. Accordingly, the Court stated that its decision in *LaLone* should not preclude statements made during "psychological treatment resulting from a medical diagnosis [of physical child abuse]." *Id.*

3. Statements Identifying the Defendant as the Declarant's Assailant

Where a declarant's statement identifies the defendant as the perpetrator of a criminal assault, concerns arise over whether the identification is necessary for obtaining adequate medical diagnosis and treatment. In *People v Meeboer (After Remand)*, 439 Mich 310, 327 (1992), a criminal sexual conduct case involving children aged seven and under, the Michigan Supreme Court found that statements identifying an assailant may be necessary for the declarant's diagnosis and treatment—and thus admissible under MRE 803(4)—as long as the totality of circumstances surrounding the statements indicates trustworthiness. The Court listed the following circumstances under which identification of an assailant may be necessary to obtain adequate medical care:

> "Identification of the assailant may be necessary where the child has contracted a sexually transmitted disease. It may also be reasonably necessary to the assessment by the medical health care provider of the potential for pregnancy and the potential for pregnancy problems related to genetic characteristics, as well as to the treatment and spreading of other sexually transmitted diseases. . . .
>
> "Disclosure of the assailant's identity also refers to the injury itself; it is part of the pain experienced by the victim.

> The identity of the assailant should be considered part of the physician's choice for diagnosis and treatment, allowing the physician to structure the examination and questions to the exact type of trauma the child recently experienced.
>
> "In addition to the medical aspect. . . the psychological trauma experienced by a child who is sexually abused must be recognized as an area that requires diagnosis and treatment. A physician must know the identity of the assailant in order to prescribe the manner of treatment, especially where the abuser is a member of the child's household. . .[S]exual abuse cases involve medical, physical, developmental, and psychological components, all of which require diagnosis and treatment.
>
> "A physician should also be aware of whether a child will be returning to an abusive home. This information is not needed merely for 'social disposition' of the child, but rather to indicate whether the child will have the opportunity to heal once released from the hospital.
>
> "Statements by sexual assault victims to medical health care providers identifying their assailants can, therefore, be admissible under the medical treatment exception to the hearsay rule if the court finds the statement sufficiently reliable to support that exception's rationale." *Id.* at 328–30.

Note: See also *People v Van Tassel (On Remand),* 197 Mich App 653 (1992), in which a 13-year-old complainant in a criminal sexual conduct case identified her father as her assailant during a medical examination ordered by the probate court in a separate abuse/neglect proceeding. The Court of Appeals held that identification of the assailant was reasonably necessary to the complainant's medical diagnosis and treatment: "[T]reatment and removal from an abusive home environment was medically necessary for the child victim of incest." *Id.* at 661.

E. Corroboration of Child's Statement Describing Sexual Act

Statements by witnesses that corroborate statements made by children under the age of 10 describing sexual acts perpetrated against them are admissible under certain circumstances. Michigan Rule of Evidence 803A states:

> "A statement describing an incident that included a sexual act performed with or on the declarant by the defendant or an accomplice is admissible to the extent that it

corroborates testimony given by the declarant during the same proceeding, provided:

> (1) the declarant was under the age of ten when the statement was made;
>
> (2) the statement is shown to have been spontaneous and without indication of manufacture;
>
> (3) either the declarant made the statement immediately after the incident or any delay is excusable as having been caused by fear or other equally effective circumstance; and
>
> (4) the statement is introduced through the testimony of someone other than the declarant.

"If the declarant made more than one corroborative statement about the incident, only the first is admissible under this rule.

"A statement may not be admitted under this rule unless the proponent of the statement makes known to the adverse party the intent to offer the statement, and the particulars of the statement, sufficiently in advance of the trial or hearing to provide the adverse party with a fair opportunity to prepare to meet the statement.

"This rule applies in criminal and delinquency proceedings only."

In *People v Dunham,* 220 Mich App 268, 271 (1996), the Court of Appeals held that the trial court properly admitted the testimony of a Friend of the Court mediator corroborating the victim's statements. The Court of Appeals concluded that the statements were spontaneous. The mediator testified that the victim's statements were in response to open-ended questions typically asked of the children of divorcing parents. The eight- or nine-month delay in reporting the alleged sexual abuse was justified given the victim's fear of the defendant. The Court of Appeals also concluded that the defendant was not prejudiced by receiving notice of the prosecutor's intent to offer the testimony one day before the trial commenced. The defendant should have anticipated the testimony because the victim's mother testified at the preliminary examination that she became aware of the abuse after the victim spoke with the mediator, and the mediator's name appeared on the witness list for trial. *Id.* at 272–73.

See also *People v Hammons,* 210 Mich App 554, 558 (1995) (daughter's fear of defendant-father's reprisals excused victim's delay in reporting for several days).

F. Dying Declarations

Under MRE 804(b)(2), statements made by the declarant believing that his or her death was imminent are admissible if the declarant is unavailable to testify at trial. The rule excepts the following statements from the hearsay rule:

> "In a prosecution for homicide or in a civil action or proceeding, a statement made by a declarant while believing that the declarant's death was imminent, concerning the cause or circumstances of what the declarant believed to be impending death."

The Court of Appeals has construed the requirement that the declarant believe that his or her death is imminent. The declarant must be *"in extremis"* and believe death is impending. The declarant's belief may be shown by the nature of the wound or other circumstances. *People v Schinzel,* 86 Mich App 337, 343 (1978), rev'd on other grounds 406 Mich 888 (1979). In *People v Siler,* 171 Mich App 246, 251 (1988), the court stated that "it is not necessary that [the victim] stated that he knew he was dying in order for the statement to be admissible as a dying declaration." On the other hand, in *People v Parney,* 98 Mich App 571, 579 (1979), the Court of Appeals concluded that a recorded statement given by a murder victim in the hospital was inadmissible as a dying declaration because the victim was not conscious of impending death. The victim stated that she would probably never get back home, but the court found that this statement could have referred to paralysis resulting from a gunshot wound. In addition, the victim's doctor informed her that her condition was improving prior to her death.

A statement that does not qualify as a "dying declaration" may be admissible as an excited utterance. *People v Schinzel,* 86 Mich App 337, 345 (1978), rev'd on other grounds 406 Mich 888 (1979).*

*See Section 8.11(B), above.

G. Statements by Declarants Made Unavailable as Witnesses by a Party's Misconduct

Effective September 1, 2001, MRE 804(b)(6) may allow an out-of-court statement by a crime victim to be admitted if a defendant's or juvenile's misconduct has rendered the victim unavailable as a witness. This rule states that the following is admissible as an exception to the hearsay rule:

> "A statement offered against a party that has engaged in or encouraged wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness."

A declarant may but need not be absent from the trial to be unavailable as a witness. Under MRE 804(a)(2) and (4), a declarant is unavailable if he or she:

> "(2) persists in refusing to testify concerning the subject matter of the declarant's statement despite an order of the court to do so; or
>
> . . . .
>
> "(4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity."

Michigan Rule of Evidence 804(b)(6) is similar to FRE 804(b)(6), which codified the long-standing principle that a criminal defendant may waive the constitutional right to cross-examine witnesses by engaging in misconduct. *United States v Ochoa,* 229 F3d 631, 639 (CA 7, 2000). The Advisory Committee's Note to FRE 804(b)(6) provides that the misconduct need not be criminal.

Michigan Rule of Evidence 804(b)(6) requires that a party engage in or *encourage* wrongdoing that procures the declarant's unavailability. On the other hand, the federal rule allows admission of a hearsay statement if a party "engaged or acquiesced in" the misconduct that procures a declarant's unavailability. See *United States v Cherry,* 217 F3d 811, 820 (CA 10, 2000) (applying the law of conspiracy to determine whether a party has "acquiesced in" the procurement of a witness's unavailability).

8.12 The Use of Sign Language and Foreign Language Interpreters

If a "deaf" person is a witness in any action, the court must appoint an interpreter for that person. MCL 393.503(1); MSA 17.55(103)(1).* The interpreter must interpret the proceedings for the "deaf" person and the "deaf" person's testimony or statements for the court and parties. *Id.* "Deaf person" is defined in the Deaf Persons' Interpreters Act, MCL 393.501 et seq.; MSA 17.55(101) et seq., as "a person whose hearing is totally impaired or whose hearing, with or without amplification, is so seriously impaired that the primary means of receiving spoken language is through other sensory input, including, but not limited to, lipreading, sign language, finger spelling, or reading." MCL 393.502(e); MSA 17.55(102)(e).

*Other methods may also be used to facilitate the person's participation, such as real-time transcription and auxiliary sound systems. See Sheridan, *Accommodations for the hearing impaired in state courts,* 74 Mich B J 396 (1995).

> **Note:** The Advisory Committee for this manual strongly suggests that family members of witnesses not be appointed as interpreters for those witnesses.

The trial court has discretion to appoint a foreign language interpreter if the witness is "not understandable, comprehensible, or intelligible," and if the lack of an interpreter will deprive the defendant of a basic right. *People v Warren (After Remand),* 200 Mich App 586, 591–92 (1993). In *Warren,* the Court of Appeals found no abuse of discretion in the trial court's refusal to

appoint a foreign language interpreter for a complainant where the complainant's difficulties in testifying were due in part to his advanced age, hearing loss, and faulty memory. *Id.* 592–93.

If the court appoints a sign language or foreign language interpreter, he or she must be qualified as an expert witness pursuant to MRE 702 unless the parties stipulate to the use of a qualified interpreter. Interpreters must also make the oath or affirmation as required by MRE 603. MRE 604. See also MCL 393.506(1); MSA 17.55(106)(1), which requires a sign language interpreter to make an oath or affirmation that he or she will render "a true interpretation in an understandable manner" and "will interpret the statements of the deaf person in the English language to the best of the interpreter's skill."

The proper manner of interpretation was set forth in *People v Cunningham,* 215 Mich App 652, 654–55 (1996), where the Court of Appeals stated:

> "As a general rule, the proceedings or testimony at a criminal trial are to be interpreted in a simultaneous, continuous, and literal manner, without delay, interruption, omission from, addition to, or alteration of the matter spoken, so that the participants receive a timely, accurate, and complete translation of what has been said . . . . The interpreter should not aid or prompt the primary witness in any way, or render a summary of what the witness stated." [Citations omitted.]

In *Cunningham,* the Court of Appeals reversed the defendant's conviction and remanded the case for a new trial because the interpreter conversed with the complainant, then summarized the complainant's statements, which denied the defendant his right of confrontation. *Id.* at 657.

8.13 Spectator Buttons and the Defendant's Right to a Fair Trial

In *People v King,* 215 Mich App 301, 304–05 (1995), the Court of Appeals held that the trial court did not err in denying the defendant's motion for a mistrial, where some spectators at trial wore buttons depicting the murder victim. The buttons, which were less than three inches in diameter, were brought to the judge's attention on the 12th day of trial and thereafter excluded. *Id.* at 305.

Courts in other jurisdictions have also addressed the issue of whether the wearing of buttons by spectators posed an unacceptable risk to a defendant's right to a fair and impartial trial. See the following cases:

F *Norris v Risley,* 918 F2d 828, 830–32 (CA 9, 1990)

Several members of a local rape task force and the National Organization for Women wore "Women Against Rape" buttons during the defendant's trial on

kidnapping and rape charges. Although the defendant did not allege that actual prejudice resulted, the court on appeal reversed his conviction because the wearing of the buttons during trial was "'so inherently prejudicial as to pose an unacceptable threat'" to the defendant's right to a fair trial. *Id.* at 830, quoting *Holbrook v Flynn,* 475 US 560, 572; 106 S Ct 1340; 89 L Ed 2d 525 (1986). The court in *Norris* concluded that the wearing of the buttons posed an unacceptable threat to two facets of the right to a fair trial: the presumption of innocence and the defendant's rights of confrontation and cross-examination. *Norris, supra,* at 833. The spectators' First Amendment rights of free expression could be curtailed because they posed a "serious and imminent threat" to the defendant's fundamental right to be presumed innocent until proven guilty at trial. *Id.* In addition, the message conveyed by the buttons constituted a statement that was not subject to the safeguards of confrontation and cross-examination. *Id.*

F *State v Franklin,* 327 SE 2d 449, 455 (W Va, 1985)

The defendant was charged with and convicted of driving under the influence of alcohol resulting in death. During the trial, 10 to 30 spectators from Mothers Against Drunk Driving and Students Against Drunk Driving wore buttons with the acronyms MADD and SADD, which were distributed at the courthouse by the local sheriff. On appeal, the court held that these activities did "irreparable damage" to the defendant's right to a fair and impartial trial.

F *State v Braxton,* 477 SE 2d 172, 176–77 (NC, 1996)

The trial court did not err in denying the defendant's motion for mistrial on grounds that several spectators wore buttons with photographs of the murder victims. Because the number and identity of the spectators wearing the buttons and the identity of the persons in the photographs were not established at trial, the court on appeal could not conclude that the buttons were inherently prejudicial.